

STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

BONIFACIO V. CUDAL,
Appellant,

and

STATE OF IOWA (DEPARTMENT OF
PUBLIC HEALTH and DEPARTMENT OF
PERSONNEL),
Appellee.

CASE NO. 92-MA-24

1992 AUG 20 AM 9 19
PUBLIC EMPLOYMENT
RELATIONS BOARD

RULING ON MOTION TO DISMISS

Charles E. Boldt, Administrative Law Judge. This action was initiated by a letter from Robert P. Montgomery, Counsel for the Appellant, Dr. Bonifacio Cudal (Cudal or Appellant), which was sent to the Iowa Department of Inspections and Appeals. The subject matter of the letter indicated a desire to appeal three grievances. The Department of Inspections and Appeals subsequently forwarded the letter to the Iowa Public Employment Relations Board (PERB or Board). PERB received this letter on January 23, 1992.

James A. McClimon was the Administrative Law Judge (ALJ) assigned as case processor to this case. On January 30, 1992, ALJ McClimon corresponded with both parties by letter. The correspondence to Mr. Montgomery included State Employee Grievance and Disciplinary Action Appeal forms. Correspondence to the Iowa Department of Personnel (IDOP) indicates the filing of the letter as an appeal, but it extends IDOP's time to answer until the proper forms were filed and served on IDOP.

The State Employee Grievance and Disciplinary Action Appeal form was received by PERB on March 10, 1992. On April 1, 1992, IDOP filed a Motion to Dismiss. The Motion to Dismiss alleges that

PERB lacks jurisdiction because a proper grievance was not filed in a timely manner. The motion also alleges that PERB lacks jurisdiction over claims involving religious, racial, national origin or retaliation claims. The motion challenges Cudal's requested remedy as a classification matter beyond PERB's jurisdiction. Finally, as another challenge to the timeliness to the appeal, IDOP asserts that the appeal is not timely since it was filed before any disposition by the Director of IDOP.

Hearing on the Motion to Dismiss was held before me on July 21, 1992. The Appellant was represented by Robert P. Montgomery and the State was represented by Kristin Johnson. At hearing, the Appellant filed a formal Resistance to Motion to Dismiss. Both parties had full opportunity to present evidence and argument in support of their respective positions. Based upon the entire record in this case, I make the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

Dr. Cudal was an Environmental Specialist III (ES III) with the Iowa Department of Public Health (DPH). On August 12, 1991, Cudal received notice that he would be laid off from his position effective at the close of business on September 12, 1991, unless he elected to exercise bumping rights to Environmental Specialist II (ES II) or Environmental Specialist I (ES I). Cudal elected to bump to an ES II position.

On September 17, 1991, counsel for Cudal sent a letter to Christopher G. Atchison (Atchison), Director of DPH. The letter expressly states:

The purpose of this letter is to notify you of our representation of Dr. Cudal, and to establish a line of communication for the discovery and exchange of information. Should some of these initial findings be confirmed, it is clear that Dr. Cudal may have an actionable claim. If so, to protect his rights, Dr. Cudal may be forced to file a claim with the Iowa Civil Rights Commission on or before September 26, 1991.

The letter identifies the role of the author as investigator and references a grievance filed by Dr. Cudal following an incident on or about March 26, 1991. The letter does not indicate that it is, or should be viewed as, a non-contract merit employee grievance. A response is requested by September 24, 1991.

On September 24, 1991, Mr. Atchison responded to Robert Montgomery's (Montgomery) letter. A date stamp indicates this letter was received September 26, 1991. The letter states that Cudal was the least senior employee in the classification in which reduction in force (RIF) was to occur. It explains how the federally funded position was filled and a state funded position eliminated. Atchison's letter denies any relationship between RIF and Cudal's grievance and refers Montgomery to his client for documentation regarding the grievance process.

Montgomery wrote to Atchison next on November 15, 1991. The letter states in relevant part:

. . . (M)y request to you is; would it be feasible for us to establish a meeting so that we might discuss in person the facts and circumstances of this case? Our intent would be to resolve this matter, to the extent that we could, without the necessity of filing an action with the

Iowa Civil Rights Commission. I believe such a meeting would be very beneficial, and I believe it would more quickly and easily address this matter as opposed to the drawn-out, cumbersome exchange of correspondence.

The letter does not indicate that it is, or should be viewed as, a non-contract merit employee grievance.

Atchison responded on December 5, 1991. In this letter, Atchison suggests that Cudal pursue avenues available to him through personnel rules for addressing the issues raised by Montgomery's correspondence.

A meeting was scheduled for and took place between representatives for both parties on January 14, 1992. Following this meeting, Montgomery wrote a letter dated January 14, 1992, to the Director of IDOP, Linda Hanson (Hanson). Montgomery relates the chronology of his correspondence with Atchison; then states:

As you can see up to this point, this matter has proceeded in a "grievance-like" manner. However, Dr. Cudal is still unsatisfied and would like to proceed with formal grievance or appeal procedures. As of this date, Dr. Cudal will be filing formal notices and proceeding with formal grievances or appeals . . . (Emphasis added.)

The letter further provides:

If possible, Dr. Cudal may pursue each of these grievances and appeals within the Department of Health, prior to taking the action to the Department of Personnel. However, should he be limited by any rules or regulations, or should he be outside the period of time allowed to him for filing any grievances or appeals with the Department of Health (sic), then Dr. Cudal requests that this letter serve as notice of appeal to the Department of Personnel.

Also on January 14, 1992, Montgomery sent a letter with the identical text as the letter to Hanson to Steve Beasley. The letter was sent to the Department of Employment Services, but it

indicated it was to go to the Director of the Department of Inspections and Appeals.

On January 22, 1992, Mary Olson, Executive Assistant at the Department of Inspections and Appeals responded to Montgomery's letter indicating the letter had been forwarded to PERB. On January 23, 1992, the letter to Mr. Beasley was received by PERB and initiated this case. On February 7, 1992, Hanson responded to her letter from Montgomery. Hanson states the grievances on the issues of RIF and pay upon bumping would not be deemed timely. Similarly, a letter from Atchison to Montgomery dated January 17, 1992, rejects Appellant's request to extend the time to file a grievance.

ALJ McClimon sent letters to IDOP and Montgomery on January 30, 1992, indicating the filing date of the appeal as January 23, 1992. The State Employee Grievance and Disciplinary Action Appeal form was filed with PERB on March 10, 1992. This form states that the Director of IDOP responded to the grievance on February 7, 1992. It alleges violations of Sections 19A.14(1), 19A.14(2), and 19A.18 of the Code of Iowa (1991).¹

CONCLUSIONS OF LAW

The issues raised by the State's Motion to Dismiss deal with jurisdictional time lines and subject matter jurisdiction before PERB. Each issue has subcomponents.

¹All references to the Code of Iowa will be to the 1991 Code unless otherwise specified.

I. Timeliness of Appeal

Two issues of timeliness were advanced by the State in support of its Motion to Dismiss. Both issues are predicated on the assumption that this ALJ will find that one of the actions taken by the Appellant constitutes the filing of a state, non-contract employee merit grievance. If the September 17, 1991, letter from Montgomery to Atchison initiated the grievance process as the Appellant contends, the State argues the filing was too late. The appeal to PERB on January 23, 1992, is argued as untimely because it was premature since nothing pertaining to this case was issued by IDOP until February 7, 1992.

The Appellant alleges violations of Sections 19A.14(1), 19A.14(2), and 19A.18. These sections provide:

19A.14 Grievances and discipline resolution

1. Grievances. An employee, except an employee covered by a collective bargaining agreement which provides otherwise, who has exhausted the available agency steps in the uniform grievance procedure provided for in the department of personnel rules may, within seven calendar days following the date a decision was received or should have been received at the second step of the grievance procedure, file the grievance at the third step with the director. The director shall respond within thirty calendar days following receipt of the third step grievance.

If not satisfied, the employee may, within thirty calendar days following the director's response, file an appeal with the public employment relations board. The hearing shall be conducted in accordance with the rules of the public employment relations board and the Iowa administrative procedure Act. Decisions rendered shall be based upon a standard of substantial compliance with this chapter and the rules of the department of personnel. Decisions by the public employment relations board constitute final agency action.

For purposes of this subsection, "uniform grievance procedure" does not include procedures for discipline and discharge.

2. Discipline resolution. A merit system employee, except an employee covered by a collective bargaining agreement, who is discharged, suspended, demoted, or otherwise reduced in pay, except during the employee's probationary period, may bypass steps one and two of the grievance procedure and appeal the disciplinary action to the director within seven days following the effective date of the action. The director shall respond within thirty days following receipt of the appeal.

If not satisfied, the employee may, within thirty calendar days following the director's response, file an appeal with the public employment relations board. The employee has the right to a hearing closed to the public, unless a public hearing is requested by the employee. The hearing shall otherwise be conducted in accordance with the rules of the public employment relations board and the Iowa administrative procedure Act. If the public employment relations board finds that the action taken by the appointing authority was for political, religious, racial, national origin, sex, age, or other reasons not constituting just cause, the employee may be reinstated without loss of pay or benefits for the elapsed period, or the public employment relations board may provide other appropriate remedies. Decisions by the public employment relations board constitute final agency action. (Emphasis added.)

* * *

19A.18 Discrimination, political activity, use of official influence prohibited. (In relevant part.)

No person shall be appointed or promoted to, or demoted or discharged from, any position in the merit system, or in any way favored or discriminated against with respect to employment in the merit system because of the person's political or religious opinions or affiliation or race or national origin or sex, or age.

Rules of IDOP governing grievances and appeals are found in Chapter 12, 581 Iowa Administrative Code. Subrule 12.1(1) provides in relevant part:

a. Step 1. The grievant shall initiate the grievance by submitting it in writing to the immediate supervisor, or to a supervisor designated by the appointing authority, written 14 calendar days following the day the grievant first became aware of, or should have through the exercise of reasonable diligence become aware of, the grievance issue.

Subrule 12.1(2) states:

12.1(2) Exceptions to time limits:

- a. If the grievant fails to proceed to the next available step in the grievance procedure within the prescribed time limits, the grievant shall have waived any right to proceed further in the grievance procedure and the grievance shall be considered settled.
- b. If any management representative fails to comply with the prescribed time limits at any step in the grievance procedure, the grievant may proceed to the next available step.
- c. The maximum time periods at any of the three (3) steps in the grievance procedure may be extended when mutually agreed to in writing by both parties.

IDOP subrules 12.2(5) and 12.2(6) govern appeals of grievance decisions and disciplinary actions, respectively.

12.2(5) Appeal of grievance decisions. An employee who has alleged a violation of Iowa Code chapter 19A or the rules adopted to implement chapter 19A may, within 30 calendar days after the date the director's response at the third step of the grievance procedure was issued or should have been issued, file an appeal with the public employment relations board. However, when the grievance concerns allegations of discrimination within the meaning of Iowa Code chapter 601A, the Iowa civil rights commission procedures shall be the exclusive remedy for appeal and shall, in such instances, constitute final agency action. In all other instances, decisions by the public employment relations board constitute final agency action.

12.2(6) Appeal of disciplinary actions. Any nontemporary, noncontract employee covered by merit system provisions who is suspended, reduced in pay within the same pay grade, disciplinarily demoted, or discharged, except during the employee's period of probationary status, shall bypass steps one and two of the grievance procedure provided for in rule 581-12.1(19A) and may file an appeal in writing to the director for a review of the action within 14 calendar days after the effective date of the action. The director shall affirm, modify or reverse the action and shall give a written decision to the employee within 30 calendar days after the receipt of the appeal.

If not satisfied with the decision of the director, the employee may request an appeal hearing before the public employment relations board. The request must be filed within 30 calendar days after the date the director's decision was issued or should have been issued. Decisions by the public employment relations board constitute final agency action.

The Appellant argues that his letter of September 17, 1991, acted as the initiation of a grievance. Ostensibly, the letter to Atchison acted as Step 1 of the grievance procedure under IDOP subrule 12.1(1)(a). The Appellant contends that the applicable standard is from the effective date of the action referenced in subrule 12.2(6) and section 19A.14(2). Implicit in this argument is that time limits were waived pursuant to IDOP subrule 12.1(2) while the Appellant sought a meeting with Atchison.

Montgomery indicates in his resistance to the Motion to Dismiss that he was surprised at the January 14, 1992, meeting when he was told that no proper grievance had been filed. Montgomery contends this was an attempt to avoid the merits of Cudal's case. He then filed simultaneous appeals with IDOP and PERB.

The Appellant also argues that neither the layoff notice nor the actual layoff were the triggering events. Appellant indicates the grievance issue arose when Cudal learned that a white male was placed in Cudal's federally funded position, sometime in September, 1991, prior to the September 17, 1991, letter from Montgomery to Atchison. The Appellant contends that this intelligence is the employee's first knowledge of the grievance issue and the September 17, 1991, letter is well within the fourteen days in which a grievance is to be filed.

The State argues that grievances brought under IDOP subrule 12.1(1) and section 19A.14(1) are not subject to the "effective date" standard. The applicable standard is the grievant's knowledge of the grievance issue. The Appellee contends the

knowledge of layoff as a grievance issue became known to Cudal on August 12, 1991, as shown by Cudal's dated signature on the layoff notice. Under this reasoning, Cudal's time for filing a step one grievance expired on August 26, 1991. No grievance was filed within that time frame.

Alternatively, Cudal could have filed a grievance with the director of IDOP within seven days of September 12, 1991 pursuant to section 19A.14(2) of the Code of Iowa or within fourteen days of September 12, 1991 pursuant to IDOP subrule 12.2(6). Nothing was submitted to the director of IDOP until the January 14, 1992 letter seeking appeal. This late notice of appeal, the State maintains, does not meet either time standard.

The State also argues the impropriety of Cudal's appeal to PERB. If the January 14, 1992 letter to IDOP is an appeal to that agency, then Appellant did not allow thirty days for the State's response before appealing to PERB. As an issue which was not yet "ripe" or is premature, the appeal to PERB is untimely.

The Appellant failed to identify either the September 17, 1991 correspondence or the November 15, 1991 correspondence as a grievance. In each letter, the only contemplated litigative action is a potential complaint before the civil rights commission. Not until the letters of January 14, 1992 does Montgomery indicate a desire to file a grievance and/or appeal on behalf of Cudal. This notice of intent to grieve came approximately four months after the effective date of the action. Appellant's contention that time lines were waived by acquiescence at DPH is unpersuasive. The

criteria for extension of time limits in IDOP subrule 12.1(2) were not met.

Similarly, the appeal to IDOP on January 14, 1992 was not filed within prescribed time limits and must be considered as untimely. The simultaneous filing of an appeal to PERB with the appeal to IDOP renders the appeal to PERB untimely. The director of IDOP has thirty days in which to respond. The February 7, 1992 response by Hanson met that criterion.

The time for filing a grievance began August 12, 1991. Under the auspices of section 19A.14(1) of the Code, and, under rules promulgated by IDOP, a grievance initiated with the employee's immediate supervisor must be filed within 14 days of knowledge of the grievance issue. In the instant case, Cudal knew of the layoff on August 12, 1991.

PERB has ruled that time lines in contested case proceedings before the agency are jurisdictional² and may not be waived by the agency. I conclude that Cudal did not initiate a grievance within DPH or to IDOP within jurisdictional time frames. Additionally, I conclude that the appeal to PERB was premature and therefore not timely. PERB is without jurisdiction to hear this matter.

II. Subject matter jurisdiction.

Issues of job classification review and discrimination are rendered moot by the determination on the timeliness issues. It is sufficient to say that IDOP Subrules 12.2(1) and 3.5 provide for classification appeal to the classification appeal committee or on

²Area Education Agency 7, 91 PERB 4252; Tebben, 92-MA-18.

to the Iowa Personnel Commission. The Iowa Supreme Court has given exclusive jurisdiction to the civil rights commission on matters covered by chapter 601A, Code of Iowa.³

Appellant alleged that his layoff was "taken in retaliation for earlier grievances filed by Brad Cudal." The State asserts in Items 16 and 18 of Division II of their motion that "retaliation" should be incorporated in issue preclusion under chapter 601A. Unfair employment practices under chapter 601A include discrimination on the basis of age, race, creed, color, sex, national origin, religion or disability. Retaliation for filing of grievances is not a precluded issue under chapter 601A and would have been a proper issue before PERB had this appeal survived the timeliness issue.

In summary, I conclude that the Appellant has not met the standards of substantial compliance with IDOP rules regarding the timely filing of a grievance or grievance appeals. Other issues raised in the motion to dismiss were rendered moot.

ORDER

IT IS THEREFORE ORDERED that the State of Iowa's Motion to Dismiss the instant appeal for lack of timely filing of a grievance, appeal to IDOP, and appeal to PERB is hereby GRANTED.

DATED at Des Moines, Iowa this 20th day of August, 1992.

PUBLIC EMPLOYMENT RELATIONS BOARD

Charles E. Boldt

CHARLES E. BOLDT
ADMINISTRATIVE LAW JUDGE

cc: Kristin Johnson
Robert Montgomery

³Polk County, 468 N.W.2d 811, 816 (Iowa 1991).